No. 90-891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES WHITE, *et al.*,
Petitioners,

v.

RAYMOND S. DANIEL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae* in support of the petition of Charles White, *et al.*, for a writ of certiorari.[1]

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to

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[1] Pursuant to Rule 37 of this Court, the Lawyers' Committee has requested the parties' consent to the filing of the attached brief. A letter indicating petitioners' consent has been filed with the Clerk of the Court. Respondents have withheld their consent.

all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee; it has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 27 years,[2] and has submitted briefs *amicus curiae* to this Court in many voting rights cases.[3]

This case involves application of the laches doctrine to suits under § 2 of the Voting Rights Act, 42 U.S.C. § 1973. The Fourth Circuit's decision would erect a per se bar to many § 2 redistricting suits filed toward the end of a decade, and thus has significance beyond the facts of this case. The Lawyers' Committee regularly represents plaintiffs in § 2 actions, and this ruling, if allowed to stand, will impair the Committee's ability to vindicate the rights of its clients. The Committee therefore has a substantial interest in the outcome of this case.

In the accompanying brief, we present arguments supplementary to those advanced by petitioners. In particular, we show that the Fourth Circuit's ruling, rather than being limited to the particular circumstances of this case, would preclude many end-of-decade § 2 redistricting suits. We also show that, in finding laches, the court of appeals failed to consider the impact of the purposes and policies of the Voting Rights Act on the application of that common law doctrine. These points will supplement those presented by the parties and may assist the Court in its

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[2] For example, the Lawyers' Committee represented a class of black citizens of Mississippi in reapportionment litigation which was before this Court on several occasions: *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); *Connor* v. *Coleman*, 440 U.S. 612 (1979); *id.*, 441 U.S. 792 (1979); *United States* v. *Mississippi*, 444 U.S. 1050 (1980).

[3] *E.g.*, *Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *Rogers* v. *Lodge*, 458 U.S. 613 (1982); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

consideration of the petition. We accordingly ask that the motion for leave to file the attached brief be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether the doctrine of laches bars end-of-decade redistricting suits under § 2 of the Voting Rights Act.

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

The decision below, if allowed to stand, threatens to bar many end-of-decade redistricting suits under § 2 of the Voting Rights Act. That is the startling result of the court of appeals' holding that laches is a complete

defense to enforcement actions brought toward decade's end and after the last scheduled election under the challenged apportionment plan: in the court's view, the timing of such actions necessarily constitutes undue delay by the plaintiffs and causes prejudice to the defendants. As we show below, this sweeping application of laches virtually precludes meaningful relief for petitioners before the next scheduled election, and threatens to bar enforcement actions in the very years in which, experience shows, many are likely to be brought.

We also show that the decision fundamentally misapplies the doctrine of laches. It neglects to consider relevant facts (such as the identity and circumstances of the plaintiffs), treats the necessary costs of dismantling a discriminatory voting scheme as a cognizable "prejudice" to defendants, and fails to consider the applicability of this common law defense in the context of the broadly remedial purposes of the Voting Rights Act.

The creation of a per se end-of-decade bar to § 2 redistricting suits would undermine the congressional goals embodied in the Voting Rights Act. For that reason—and because the decision below conflicts with *Garza* v. *County of Los Angeles*, 1990 U.S. App. Lexis 19470 (9th Cir. 1990) (to be reported at 918 F.2d 763)—the Court should grant review.

I. THE DECISION BELOW WOULD BAR END-OF-DECADE § 2 REDISTRICTING SUITS

The court of appeals noted that application of laches "depends upon the particular circumstances of the case." Pet. App. at 10. Yet, the striking fact about its reasoning is that it would bar virtually all § 2 redistricting suits brought toward the end of one decade or the beginning of the next. That is because the court applied laches solely on the basis of the time in the decade when this suit was brought, without any real consideration of the particular circumstances and equities of the parties.

Thus, the court based its finding that petitioners had unreasonably delayed their suit almost entirely on the lateness in the decade of the filing. *Id.* at 11-12. It did not consider other relevant factors, such as: the time each petitioner had resided in the county; how long each petitioner had been of voting age and a registered voter; each petitioner's subjective knowledge of the violation; the existence of racial harassment,[1] financial constraint, or some other factor that prevented or discouraged earlier filing; the possibility that, although originally innocuous, the plan had become discriminatory through population shifts; and finally, whether petitioners as a practical matter represented the interests of others who could not be said to have unreasonably delayed had they been included as parties.[2] The court ignored these relevant factors by holding in essence that every redistricting suit filed toward decade's end is by definition unreasonably delayed.

The court of appeals' finding of prejudice to defendants also rested almost entirely on the approaching end of the decade, and the fact that the last election under the existing apportionment scheme had been held. The court found prejudice in the possibility that there might be "two reapportionments within a short period of two years," and the necessity of relying on 1980 census figures for any relief. Pet. App. at 15-16. We show below that these unavoidable costs of court-ordered reapportionment are not the sort of prejudice that supports the

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[1] The district court's opinion described "a long history of discrimination" in Brunswick County, Pet. App. at 24-29, including a "very active" Ku Klux Klan in the 1960s. *Id.* at 27.

[2] By their nature, successful Voting Rights Act suits will generally benefit others besides the named plaintiffs. See *Bishop* v. *Lomenzo*, 350 F. Supp. 576, 581 (E.D.N.Y. 1972) (because violation of Voting Rights Act could "affect the rights of thousands of qualified voters . . . enforcement of such an important federal law . . . should not be defeated because of laches *on the part of the named plaintiffs*" (emphasis added)). Thus, for example, the rights of any new residents and eighteen-year-old voters were at stake here.

laches defense. For present purposes it is enough to note that every successful § 2 lawsuit brought later in a decade will rely at least in part on data from the previous census and occasion judicial relief shortly before new census figures are released.

In short, the court of appeals' laches findings could be made in any end-of-decade § 2 redistricting action. The facts of this case, moreover, show that the bar could easily extend for four to five years. In Brunswick County, the last regularly scheduled election of the 1980s for the Board of Supervisors was held in November 1987. The ruling below apparently bars any suit filed after that date, and earlier Fourth Circuit opinions on which the court relied bar suits filed in the months immediately preceding an election. Pet. App. at 13-14.[3] Thus, any suit challenging the existing apportionment would have to have been filed in the early months of 1987 at the latest.

In the new decade, no suit can be entertained, under the court of appeals' ruling, until the 1991 reapportionment is in effect. See Pet. App. at 17 ("It makes far more sense to await the 1990 census figures and the 1991 reapportionment (if required) than for a court to intervene at such a late hour."). The result is a four-year hiatus in which no apportionment challenge can be brought.[4]

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[3] *Simkins* v. *Gressette*, 631 F.2d 287, 294-96 (4th Cir. 1980); *Maryland Citizens for a Representative General Assembly* v. *Governor of Maryland*, 429 F.2d 606, 609 (4th Cir. 1970). See also *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), noting that "where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . ."

[4] What constitutes an end-of-decade suit will depend in part on the schedule of elections in the decade. In Brunswick County in the 1990s, for instance, elections for the Board of Supervisors are to take place in 1991, 1995, and 1999.

II. THE DECISION BELOW THREATENS TO PRECLUDE RELIEF UNTIL AFTER THE 1991 ELECTION

The court of appeals evidently believed that a grant of relief to plaintiffs now, after the last scheduled election of the 1980s, would be pointless because there will probably be a redistricting when the 1990 census results are returned, and plaintiffs will be free then to assert a "new justiciable cause of action." Pet. App. at 17. In fact, however, there can be little realistic hope that such a suit would afford relief before the 1991 election.

After receiving the census data some time in 1991,[5] County officials will have to debate and, presumably, hold hearings before devising a new plan. The Justice Department will then have to preclear any changes under § 5 of the Act.[6] Hence, it is almost inconceivable that a new plan could be in place before June or July.[7] At the same time, candidates for the November election who are involved in primaries must declare for the primary in early April, Va. Code Ann. § 24.1-184 (1985); and party primaries will be held on, and candidates not involved in primaries must declare by, June 11, 1991. *Id.* §§ 24.1-174, 24.1-166(B)(1). Even if a new redistricting plan were devised, approved, and precleared by early summer, the County would no doubt argue that a challenge then would be inappropriate, since its "election machinery is already in progress." *Reynolds* v. *Sims*, 377 U.S. at 585. See *supra* note 3. Accordingly, the court of appeals' decision means that relief may well be unavailable in time for the 1991 election.

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[5] The data are not required to be made available to the states until April 1, 1991. 13 U.S.C. § 141.

[6] This process usually takes a minimum of 60 days, and can take up to twice that long. 42 U.S.C. § 1973c; 28 C.F.R. § 51.37.

[7] In their brief to the court of appeals (at 57) petitioners noted that the 1981 plan did not go into effect until December 1981.

Thus, contrary to the court of appeals' view, its ruling is not loyal to the "principles of equity [that] require a federal court to stay its hand when judicial relief makes no sense." Pet. App. at 16. Instead its ruling invites precisely the kind of dislocation and confusion it purported to avoid, encouraging a post-reapportionment lawsuit that would not afford relief in advance of the scheduled balloting, absent a disruptive stay of the election.[8]

The district court's order, by contrast, provided for orderly relief prior to the 1991 election while minimizing any dislocations occasioned by the results of the 1990 census. It adopted a plan to "be in effect for the 1991 election to the Board of Supervisors," and directed that any redistricting necessitated by the census "be done to the minimum extent possible . . . subject to Court supervision." Pet. App. at 19.[9] Thus, the district court's order, directed specifically to the 1991 election, appears to have afforded the most realistic—and certainly the least disruptive—prospect of installing a nondiscriminatory voting plan in Brunswick County before the 1991 elections. In short, the fact that the last scheduled election under the 1981 plan had occurred did not render current, forward-looking judicial relief meaningless.[10]

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[8] The court of appeals ruled that petitioners could not complain of their inability to file suit between the 1991 reapportionment and the 1991 election because it was "their tardiness in challenging the 1981 reapportionment that led to their predicament." Pet. App. at 17 n.10. That was plainly wrong: petitioners' suit preceded the 1991 election by over three years.

[9] Perhaps because it provided prospective relief, the district court did not grant an interim election. Had its prospective relief truly been gratuitous, as the court of appeals held, Pet. App. at 16, the district court might have ordered more drastic immediate relief.

[10] Indeed, even if population changes in Brunswick County are sufficient to require affirmative reapportionment for the 1990s, the current discriminatory plan may, absent judicial intervention, be carried forward to a great extent in the 199[illegible] plan. Significant restructuring is likely to be both difficult and politically contentious,

III. THE DECISION BELOW IMPAIRS THE PROTECTIONS OF § 2 OF THE VOTING RIGHTS ACT

"The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). As we have seen, however, the Fourth Circuit's ruling could bar suits seeking to vindicate this vital goal for up to half of every decade. Further, suits filed in the latter part of the decade have been important tools for enforcement of § 2. Of the 18 reported § 2 redistricting cases [11] of which we are aware that were filed in the 1980s, eight were filed in 1987 or later.[12]

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and thus will not be readily embraced by elected officials without some impetus. Moreover, incumbent officials are unlikely to support any plan that radically alters their safe and familiar districts or that pits two incumbents against one another.

[11] Redistricting cases, as we use the term here, challenge electoral districts that are subject to decennial reapportionment following the census. Challenges to an electoral unit whose boundaries coincide with those of a political subdivision such as a county, and hence do not vary with census results, would not be directly affected by the decision below.

[12] Besides *White* v. *Daniel*, seven reported cases involved § 2 redistricting challenges filed in 1987 or later: *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (1988 filing); *Armour* v. *Ohio, vacated for reh'g en banc*, 895 F.2d 1078 (6th Cir. 1990) (1988 filing); *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge panel) (1989 filing); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989) (1987 filing challenging 1983 plan); *McDaniels* v. *Mehfoud*, 702 F. Supp. 588 (E.D. Va. 1988) (1988 filing); *Neal* v. *Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988) (1987 filing); *Smith* v. *Clinton*, 687 F. Supp. 1310 & 1361 (E.D. Ark.) (three-judge panel) (1988 filing), *aff'd mem.*, 488 U.S. 988 (1988).

The redistricting cases that were, to our knowledge, filed earlier in the decade were: *Bandemer* v. *Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986); *Gingles* v. *Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge panel), *aff'd in part and rev'd in part sub nom. Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *Ketchum* v. *Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Knox* v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. 1112

There are both legal and practical factors that explain why many suits are filed toward the end of a decade. First, the necessity under § 2 of analyzing a pattern of elections over time may preclude filing suit until one or more elections have passed. Further, someone must recognize that a plan has discriminatory impact before any studies will be undertaken; yet the injury of vote dilution may be subtle, and such recognition slow in coming.

The Fourth Circuit's ruling does not recognize these realities, with two likely results. First, as happened here, meritorious suits will simply be thrown out of court. Alternatively, plaintiffs may hasten into court with uncertain empirical data to support their claims. In either event, the holding below will impair achievement of the goals of the Voting Rights Act.

IV. THE DECISION BELOW CANNOT BE JUSTIFIED ON GROUNDS OF LACHES

We have shown that acceptance of the court of appeals' reasoning would create a per se bar to end-of-decade suits, make effective relief for petitioners before the 1991 elections virtually unattainable, and greatly impede the effectiveness of § 2 suits. None of these drastic results is justified, let alone required, by the doctrine of laches.

A. The Elements of Laches Are Not Satisfied Here.

As we demonstrated above, the court's finding that petitioners unreasonably delayed their suit was made without consideration of the particular circumstances affecting the reasonableness of any delay. The court thus purported to do equity while ignoring the equities of the case.

(E.D. Wis. 1985); *Jordan* v. *Winter*, 604 F. Supp. 807 (N.D. Miss.), *aff'd mem. sub nom. Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984); *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge panel); *Rybicki* v. *State Board of Elections*, 574 F. Supp. 1147 (N.D. Ill. 1983) (three-judge panel); *Seastrunk* v. *Burns*, 772 F.2d 143 (5th Cir. 1985); *Terrazas* v. *Clements*, 581 F. Supp. 1329 (N.D. Tex. 1984); *Washington* v. *Tensas Parish Sch. Bd.*, 819 F.2d 609 (5th Cir. 1987).

Nor can the prejudice identified by the court of appeals support laches. It arises, not from any delay by petitioners, but rather from respondents' own wrongdoing. See *Jeffers* v. *Clinton*, 730 F. Supp. 196, 202-03 (E.D. Ark. 1989) (three-judge panel) ("the expense, trouble, and disruption" of compliance with a judicial redistricting decree "are not a consequence of plaintiffs' delay," because they "would have occurred whenever the suit was filed").

The court of appeals first found that "two reapportionments within a short period of two years" would create instability in the electoral system and impose financial burdens on respondents. Pet. App. at 15. But these burdens are no greater than the burdens of two reapportionments at any two points in the decade.[13] If the 1990 census makes reapportionment necessary, the cost would be the same regardless of whether relief in this suit had been granted in 1984 or 1989. In any event, the district court's order would have minimized any such dislocations by limiting changes based on the 1990 census; there was no realistic prospect of two complete reapportionments. See *supra* p. 6.

The court of appeals also found prejudice in the necessary reliance on the 1980 census data, which it feared might be outdated. Pet. App. at 16. But relief granted in a suit brought in 1982 would also have relied on 1980 data, and would have remained in effect throughout the decade; presumably, such a suit would not have been barred. Since an apportionment scheme in effect in 1990, whether as a result of a 1982 suit or a 1988 suit, would be based on 1980 data, the need to rely on 1980 data

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[13] Indeed, if there is an unlawful reapportionment in 1991, a successful § 2 suit filed soon thereafter would result in precisely the cost identified by the court of appeals: two reapportionments within two years, causing the same "instability and dislocation" and "financial and logistical burdens," Pet. App. at 15, faced by the County under the district court's order.

cannot constitute prejudice to the respondents. This is another example of the court of appeals' confusion of the costs of remedying a Voting Rights Act violation with the costs of delay. In sum, the court of appeals identified no prejudice flowing from delay that would justify application of laches.

B. The Fourth Circuit Failed To Give Effect to the "Gravitational Pull" of the Voting Rights Act on the Federal Common Law Doctrine of Laches.

Judicial application of a common law doctrine—especially an equitable doctrine such as laches—in a suit involving a federal statute must accommodate the congressional will, which reflects and defines the public welfare. See *Deitrick* v. *Greaney*, 309 U.S. 190, 197-199 (1940) (modifying "strict and technical" terms of equitable doctrine of estoppel in light of "purposes and policy" of federal statute); *Morton Salt Co.* v. *Suppiger Co.*, 314 U.S. 488, 493 (1942) ("where maintenance of the suit concerns the public interest as well as the private interests of suitors," there are "additional considerations" in determining whether equity will prevent the suit); G. Calabresi, *A Common Law for the Age of Statutes* 85-86 & n.15 (1982) (statutes may, like judicial decisions, have a "gravitational pull" that influences development of the common law).

The Voting Rights Act provides express congressional recognition of the fundamental nature of the right to vote—a right that is "fundamental 'because preservative of all rights.'" *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965) (quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886)). Accordingly, numerous courts have recognized that the public interest in protecting voting rights must weigh heavily in any application of laches. The court in *Jeffers* v. *Clinton*, for instance, in rejecting a laches defense to a § 2 action, held that "[t]o the extent that electoral confusion and disruption exceed what they would

have been if the case had been filed earlier, *we think that fairness and equal opportunity in voting are worth it.*" 730 F. Supp. at 203 (emphasis added); see also *Hershcopf* v. *Lomenzo*, 350 F. Supp. 156, 159 (S.D.N.Y. 1972) (declining to apply laches in Voting Rights Act case because "the right to vote is too fundamental in the democratic process to be denied upon any such plea"); *Bishop* v. *Lomenzo*, 350 F. Supp. 576, 581 (E.D.N.Y. 1972) ("the public interest in enforcement of such an important federal law [as the Voting Rights Act] is paramount and should not be defeated because of laches on the part of the named plaintiffs"); *Knox* v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. 1112, 1118-19 (E.D. Wis. 1985) (delay does not "warrant wholesale dismissal of the important issues" raised by suit; prejudice of redistricting is "a necessary consequence of ensuring that the voting rights of all . . . residents are upheld in a manner consistent with the federal constitution and the statutes enacted to enforce it").

In this case as well, Congress' goal of safeguarding and enforcing the fundamental nature of the right to vote should have prevented application of laches. The decision below wrongly ignored the statutory purpose of "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*, 383 U.S. at 328, and established a contrary rule, purportedly required by the common law doctrine of laches, that instead protects discriminatory structures from review.[14] The ruling flouts the policies of the Voting Rights Act and warrants review here.

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[14] By operating essentially as a matter of law, the Fourth Circuit's end-of-decade bar functions more in the fashion of a statute of limitations than as a flexible doctrine of equity. Congress was itself capable of inserting such a limitations period into the Voting Rights Act, but did not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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